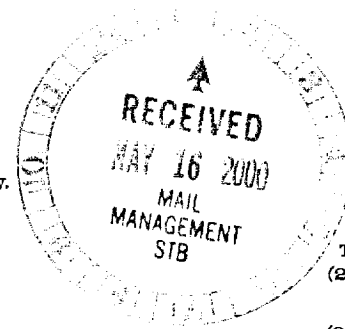


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May 16, 2000

VIA HAND DELIVERY

The Hon. Vernon A. Williams
Secretary
Surface Transportation Board
Case Control Unit
Attn: STB Ex Parte No. 582
1925 K Street, N.W.
Washington, D.C. 20423-0001

MAY 16 2000

Part of
Public Record

Re: Ex Parte No. 582 (Sub No. 1), Major Rail
Consolidation Procedures

Dear Secretary Williams:

Enclosed for filing in the above-referenced proceeding are the original and 25 copies of the Comments of the Eastern Coal Transportation Association. Also enclosed is a 3.5-inch diskette containing the text of this letter and the enclosed Comments in WordPerfect 8.0 format.

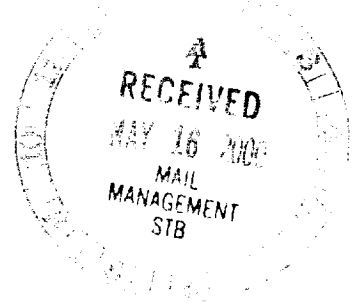
Please acknowledge receipt of the enclosed filing by stamping and returning to our messenger the enclosed duplicate of this letter.

Sincerely,

Kelvin J. Dowd

KJD/cbh
Enclosures

BEFORE THE
SURFACE TRANSPORTATION BOARD



In The Matter Of:

MAJOR RAIL CONSOLIDATION
PROCEDURES

)
)
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) Ex Parte No. 582
) (Sub No. 1)
)
)

RECEIVED
Office of the Secretary

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Public Record

COMMENTS OF THE
EASTERN COAL TRANSPORTATION ASSOCIATION

OF COUNSEL:

Slover & Loftus
1224 Seventeenth Street, NW
Washington, D.C. 20036

Dated: May 16, 2000

THE EASTERN COAL
TRANSPORTATION ASSOCIATION

Kevin J. Larkin
President
Kelvin J. Dowd
Executive Director
1226 Seventeenth Street, NW
Washington, D.C. 20036

BEFORE THE
SURFACE TRANSPORTATION BOARD

)	
)	
In The Matter Of:)	
)	
MAJOR RAIL CONSOLIDATION)	Ex Parte No. 582
PROCEDURES)	(Sub No. 1)
)	
)	

**COMMENTS OF THE
EASTERN COAL TRANSPORTATION ASSOCIATION**

The Eastern Coal Transportation Association ("ECTA") submits these Comments in response to the Advance Notice of Proposed Rulemaking ("Notice") served on March 31, 2000. ECTA appreciates this opportunity to share with the Board its Members' views regarding revision of the Board's rules governing the review of Class I railroad merger and acquisition proposals.

I.

IDENTITY AND INTEREST

ECTA is a voluntary organization comprised of producers and consumers of coal mined from sources East of the Mississippi River, and related service providers. ECTA is dedicated to the promotion of its Members' interests in dependable, efficient and economical transportation of coal via all surface modes, the most significant of which is rail. Collectively, ECTA Members are

responsible for the transportation of over 180 million tons of Eastern coal each year. A list of current Members is attached hereto as Exhibit A.

In its February 29, 2000 Comments filed in Ex Parte No. 582, Public Views on Major Rail Consolidations, ECTA addressed steps the Board might take in its review of rail merger applications to ensure, among other things, that a thorough and complete evaluation is made of post-transaction service impacts and claimed operating cost savings and merger efficiencies. The Board's Notice highlights several of these issues, and references broad areas in which it intends to revise its substantive rules governing the consideration of major rail merger applications. These include competitive issues, service performance issues, safety and employee issues, and international trade and foreign control issues. Each of these, and in particular the first two, are of interest to ECTA as they may affect its producer Members' marketing success, and the ability of its Member electric utilities and other consumers to stabilize delivered fuel costs.

II.

INTRODUCTION

The Board's Notice requests public comment on nine (9) specific issues under the broad areas delineated above. From the perspective of the ECTA, five (5) of these issues relate most directly to ECTA's defined scope of mission, which focuses primarily on the promotion of rail service quality. They are as follows:

- Downstream Effects;
- Safeguarding Rail Service;
- Promoting and Enhancing Competition;
- Shortline and Regional Railroad Issues; and
- Merger-Related Public Interest Benefits.

In its Comments below, ECTA will address in further detail a number of important issues related to each of the areas listed above.

ECTA believes that the place to start on service quality is to mandate that rail merger applicants submit formal Service Impact Statements concurrently with their applications. Such statements would include detailed and systematic descriptions of how the carriers will commit to providing transportation service to their customers in a predictable, consistent manner that meets the customers' needs. Service

Impact Statements would be subject to STB approval in final form, and be binding on the applicants.

Another effective way for the Board to help ensure that applicant carriers provide efficient service post-transaction is by injecting more intra-carrier competition into the merger review process. Measures to achieve this include removing roadblocks to using statutory terminal access remedies, and implementing policies that encourage the use of the productive (and often underutilized) assets of shortlines and regional railroads.

Finally, ECTA submits that policies should be put in place to ensure that railroad users who are promised improved efficiencies and reduced costs through mergers are not saddled with cost overruns and other expenses in the event these promises are not realized. These changes to the Board's governing merger review rules, as well as a more stringent review of the competitive impact of transactions under the guidance of the antitrust laws, are necessary tools to ensuring that future merger transactions are evaluated in a manner consistent with the public interest.

III.

COMMENTS

A. Eliminating the "One Case at a Time" Rule

The Board's Notice indicates that it "definitely intend[s] to propose" the elimination of its "one case at a time" rule at 49 C.F.R. § 1180.1(g). That rule limits the Board's ability to consider certain "cumulative impacts and crossover effects" of merger transactions. The Board previously addressed this issue in response to the notice of the Burlington Northern and Santa Fe Railway Company ("BNSF") and Canadian National Railway ("CN") of their intent to file a common control application. On December 28, 1999, the Board served a decision indicating that it would be waiving its "one case at a time" rule for purposes of that proceeding.

ECTA agrees with the Board's rationale stated in the context of the BNSF/CN proceeding that its "one case at a time" rule should be revised, given the state of the North American railroad industry and the recent post-merger rail disruptions experienced by merging eastern and western railroads. Individual railroad merger transactions can no longer be reviewed in a vacuum -- especially now, when there are only four major railroads left in the United States.

ECTA commends the Board for its proposal to eliminate its one case at a time approach. Clearly, the downstream impacts of individual mergers should be considered by the Board and there should be an explicit focus on the transaction's likely effects on rail service.

B. Service Impact Statements

The Board's Notice solicits proposals for changes to its merger rules to protect the public "from merger-related service disruptions and the loss of adequate infrastructure and capacity." The recent service-related problems experienced in the East following the acquisition and division of Conrail by CSXT and Norfolk Southern accents the need for more vigorous before-the-fact service impact review mechanisms.

The recent record shows that service quality promises made by railroads during the merger review process have not been met post-transaction. Because of the limited staff and resources available to the Board, it is difficult if not impossible to rely exclusively on post-hoc monitoring of service impacts arising from merger implementation.¹

¹ As part of the Board's decision approving the CSXT and Norfolk Southern transaction, the Board imposed certain operational monitoring conditions. The Board required the railroads to file periodic information and progress reports on the various operational aspects of the transaction. The Board's
(continued...)

Formal and systematic procedures for addressing post-transaction railroad service operations before-the-fact should be implemented by the Board. One vehicle for such review would be a requirement that railroad merger applicants file detailed Service Impact Statements ("SIS"), similar in scope and detail to environmental reports and safety integration plans that are currently required by the Board. A proposed SIS should be filed concurrently with the application, and be open to discovery and comment by parties on the adequacy of the applicants' plan. The proposed SIS would be subject to Board approval in final form, binding on the applicants insofar as affirmative steps or plans are included, and subject to enforcement through mandatory oversight.

At a minimum, the following areas should be required to be addressed as part of a merger applicant's SIS:

- (1) Scheduling, service request processing, data interchange functions, and shipment tracking;
- (2) Systems for accessible and timely shipper information;

¹(...continued)

rationale was that such reports were necessary for it to evaluate and respond to service problems and other operational issues that might arise post-transaction. ECTA believes that while these periodic operating reports to the Board are helpful in identifying certain service issues, they are insufficient to address lingering and recurring problems in the areas of customer service and on-time performance.

- (3) Procedures to set, monitor, and meet service commitments and schedules;
- (4) Allocation of human and equipment resources, and procedures for non-discriminatory dispatch of resources, permits, etc. during periods of constrained capacity;
- (5) Transparent access to pricing information, railcar availability, planned track maintenance or outages; and
- (6) Systems for objective and timely investigation and resolution of service-related complaints and claims.

The size, scope, and complexity of recent merger transactions demonstrates that integrating railroad operating systems, marketing departments, personnel, etc. presents significant challenges. The implementation of a systematic plan into the merger implementation process, explaining the manner in which service issues will be addressed and resolved post-transaction, will help ameliorate service disruptions. A mandatory SIS can help assure railroad customers and the Board that the applicant railroads are prepared to provide for the orderly integration of operating and marketing systems. An SIS also would alleviate some of the burden on the Board for operational oversight, by allowing the parties themselves to address service-related issues that might arise post-transaction.

C. Promoting Effective Competition

ECTA agrees with the Board's Notice that "the time has come" for the Board to consider revising its rail merger policies in order "to place a greater emphasis on enhancing, rather than simply preserving, competition." The implementation of pro-competitive intra-carrier policies will contribute to improved service levels, and is especially important in light of the national rail transportation policy requiring the Board "to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail." See 49 U.S.C. §§ 10101(1), (4) and (5).

The Board's merger policies should be revised to reflect a commitment to promoting competition, not merely preserving it. The Board should remain open to imposing case-by-case competitive remedies. However, at a minimum, rules should be adopted requiring open access within terminal areas, mandatory reciprocal switching at non-discriminatory fees within districts that would be served by only one or two carriers post-merger, and the presumed qualification of bottleneck line segments created or acquired by a merger for individual rate review and, if necessary, Board prescription.

With the recent consolidation of the railroad industry and rationalization of lines caused by the railroads' systematic

line abandonment policies, the Board should favorably consider new policies facilitating competition, where operationally feasible, to restore bona fide transportation alternatives to areas and customers who are left without competitive service options.

D. Protecting Essential Shortline and
 Regional Railroad Services

As the Board has recognized, shortlines and regional railroads provide an invaluable resource in gathering and distributing traffic flowing over the lines of Class I railroads. Unfortunately, and despite recent and persistent Class I line capacity constraints, the productive resources of the shortlines remain underutilized.

In major railroad merger proceedings, the Board generally has imposed conditions to assist the competitive position of shortlines where necessary to protect a particular shortline from specific, adverse impacts of a given transaction, such as where a merger would cause a shortline to lose one of its two Class I connections. ECTA believes that the Board can and should be more proactive to ensure that sufficient conditions are imposed to utilize the valuable assets of shortlines.

ECTA supports the revision of Board merger policies to eliminate contractual barriers to interchange ("paper barriers") that are not demonstrated to be reasonable, alternative financing mechanisms. ECTA also supports rules requiring merging carriers to establish enforceable systems of non-discriminatory pricing and railcar supply allocation for connecting shortlines. Such reasonable pro-competitive policies would provide a meaningful way for the Board to preserve and promote shortline railroads and the interests of the shippers they serve.

E. Protecting the Public from Merger Premiums
and Service Failure Costs

In the Conrail division proceeding, the Board declined requests for a separation (for regulatory accounting purposes) of the multi-billion dollar "acquisition premium" paid by CSXT and Norfolk Southern for Conrail. In doing so, the Board determined that it was not "credible" that captive shippers would be forced to pay higher rates in order to allow the applicants to recover the premium. Unfortunately, recent press statements from railroad industry leaders belie the fact that the merging railroads will not attempt to pass-through such burdens to their customers.²

²See, e.g., Daniel Machalaaba, Railroads Put New Handling
(continued...)

The Board's current merger guidelines may have limited its ability to protect customers from many of the service problems associated with recent mergers. However, the Board can and should protect shippers from having to pay higher rates as a result of those service problems. ECTA supports the adoption of rules that prohibit inclusion of acquisition premiums or service-related operating cost increases in railroad cost accounts for regulatory purposes, and exclude as "special charges" operating cost increases that are shown to be the result of merger-related dislocations or inefficiencies. Compare Finance Docket No. 33726, Western Coal Traffic League v. Union Pacific Railroad Co., Decision served May 12, 2000.

F. The Board Should Incorporate DOJ Antitrust Considerations More Fully into the Merger Review Process

The Board currently evaluates the competitive impact of merger applications under its "public interest" standard -- with the antitrust laws merely providing "guidance." In contrast, a much stricter review of the competitive impacts of non-railroad mergers occur under the antitrust laws as administered by the Department of Justice and the Federal Trade Commission. With the

²(...continued)

Fees on Track: Big Firms Begin Raising Their Rates This Year, Some by as Much as 4%, Wall St. J., Feb. 9, 2000, at A3; Lawrence H. Kaufman, Railroad Rates, J. of Commerce, Jan. 31, 2000, at 1.

railroads now in an unprecedented state of concentration, ECTA believes that the Board should place greater emphasis on evaluating future mergers and consolidations using principles developed under the antitrust laws applicable to other industries. At a minimum, if a violation of the antitrust laws would be triggered by a proposed railroad merger transaction, the Board should approve the application only if it imposes significant, pro-competitive ameliorating conditions.

IV.

CONCLUSION

49 U.S.C. § 11324 mandates that a consolidation of Class I railroads can be approved only if it is consistent with the public interest. The public interest includes consideration of the effect of the transaction on the adequacy of transportation to the public and whether the proposed transaction will have an adverse effect on competition among rail carriers. The recent spate of railroad consolidations has left the eastern United States with only two carriers providing service, and there are only limited areas where these carriers directly compete. ECTA submits that too little attention has been paid in recent mergers to ensuring that rail customers and producers receive adequate, competitive service. At a minimum, the measures outlined herein

should be included in the Board's revised rules for reviewing future railroad merger proposals.

Respectfully submitted,

THE EASTERN COAL
TRANSPORTATION ASSOCIATION

OF COUNSEL:

Slover & Loftus
1224 Seventeenth Street, NW
Washington, D.C. 20036

Dated: May 16, 2000

Kevin J. Larkin
President

Kelvin J. Dowd

Executive Director

1226 Seventeenth Street, NW
Washington, D.C. 20036

A handwritten signature in black ink, appearing to read 'K. Dowd', is written over the printed name of Kelvin J. Dowd.

EASTERN COAL TRANSPORTATION ASSOCIATION MEMBERS

American Electric Power - Columbus, OH
Arch Coal Sales, Inc. - St. Louis, MO
Carolina Power & Light - Raleigh, NC
Consol Energy - Pittsburgh, PA
David Joseph Co. - Cincinnati, OH
Detroit Edison Company - Detroit, MI
Duke Energy - Charlotte, NC
First Energy - Akron OH
Oglethorpe Power Corp. - Tucker, GA
Peabody COALSALES Company - St. Louis, MO
Potomac Electric Power Co. - Washington, D.C.
RAG American Coal Sales Company - Englewood, CO
Southern Company Services, Inc. - Birmingham, AL
St. Johns River Power Park - June Beach, FL

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of May, 2000, I caused a copy of the foregoing Comments to be served on all persons designated as a Party of Record or Member of Congress in the Board's decisions in this proceeding served April 28 and May 10, 2000, by first-class United States Mail.



Kelvin J. Dowd